Tan Tek Sin & Anor v Tetuan Nora Hayati & Assoc (sued as a firm)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–844–05 OF 2014
RAUS SHARIF PCA, AZAHAR MOHAMED AND LIM YEE LAN JJCA
19 NOVEMBER 2014

Legal Profession — Remuneration — Bill of costs — Taxation of costs — Application for taxation of costs by client — Whether application made within one year after delivery of bill of costs — Whether bill of costs properly served on client — Whether professional fee exorbitant — Extension of time — Whether special circumstances existed to grant extension of time after expiry of one year after service of bill on client — Whether court has inherent jurisdiction to grant extension of time and hear application made after one year — Whether special circumstances shown — Legal Profession Act 1976 ss 126 & 128

The appellants ('the plaintiffs') were the beneficiaries of the estate of Law Kuar ('the estate') while the respondent ('the defendant') was a firm of advocates and solicitors. The plaintiffs had engaged the defendant to obtain a court order for the letters of administration of the estate ('the legal work'). Upon completion of the legal works, the defendant raised a bill for RM631,141.20 of which RM600,000 was for legal fees alone, and sent it by registered post to the plaintiffs. The plaintiffs stated that they did not receive the bill in question. In the sessions court, the defendant filed an action against the plaintiffs for the legal fees. In disputing the bill on the ground that a sum in excess of RM600,000 was excessively exorbitant and wholly disproportionate to the legal work expended, the plaintiffs sought: (i) the orders that the time limited by ss 126 and128 of the Legal Profession Act 1976 ('the LPA') for the filing of the present suit be extended in favour of the plaintiffs; (ii) the defendant be compelled to prepare a detailed bill of costs pursuant to O 59 r 17(2) of the Rules of Court 2012; and (iii) the said bill of costs be then taxed on a solicitor-client basis. The defendant submitted that the plaintiffs were precluded from challenging the bill as more than 12 months had lapsed since the delivery of the bill to the plaintiffs. The High Court dismissed the plaintiffs' application and hence, this appeal by the plaintiffs.

Held, allowing the appeal with no order as to costs:

(1) The bill was sent to the plaintiffs' respective addresses. The plaintiffs had acknowledged receipt of the bill. Once the plaintiffs had received the bill, it was prima facie proof of delivery to the plaintiffs. Having received the bill, it was incumbent upon the plaintiffs, pursuant to s 126(1) of the

LPA, to file a petition within six months from the delivery if the plaintiffs intended to dispute the bill, which the plaintiffs failed to do (see paras 20–22).

(2) The sum reflected in the bill did not immediately crystallise and become a debt due to the defendant merely upon the expiry of the one year period after the delivery of the bill to the plaintiffs. There is no provision under the LPA that specifically provides for extension or enlargement of time to file an application for taxation of a bill of costs, after one year from its delivery to the aggrieved party (see paras 25–26).

(3) The plaintiffs had engaged the defendant to obtain a relatively uncomplicated court order for the letters of administration. The defendant had set-out the particulars of the legal work done without any sum being shown against each item. The bill only just showed a lump sum of RM600,000 representing the costs of all the items. This was in itself a special circumstance, which was a ground for the court to exercise its inherent jurisdiction to allow the plaintiffs' extension of time and to refer the bill for taxation and determination (see paras 32–33).

(4) The fee of RM600,000 was arguably grossly excessive and did not commensurate with the legal work done. This, prima facie, was a special circumstance that warranted the High Court to exercise its inherent jurisdiction by granting an order for taxation. There was never any averment made by the defendant in their affidavit to challenge the plaintiffs' contention in the affidavit in support that the sum of RM631,141.20 was astronomical. The defendant in opposing the application did not explain or clarify the exorbitant fee of RM600,000 (see paras 34–35).

[Bahasa Malaysia summary

Perayu-perayu ('plaintif-plaintif') adalah benefisiari estet Law Kuar ('estet') sementara responden ('defendan') adalah firma peguambela dan peguamcara. Plaintif-plaintif telah mengupah defendan untuk mendapatkan surat pentadbiran estet ('kerja undang-undang'). Apabila kerja undang-undang selesai, defendan mengemukakan bil sebanyak RM631,141.20 yang mana sebanyak RM600,000 adalah semata-mata untuk fi undang-undang, dan menghantarnya melalui pos berdaftar kepada plaintif-plaintif. Plaintif-plaintif menyatakan bahawa mereka tidak menerima bil yang dipersoalkan tersebut. Dalam mempertikaikan bil atas alasan jumlah lebih daripada RM600,000 adalah terlalu tinggi dan tidak seimbang kepada kerja undang-undang yang dijalankan, plaintif-plaintif memohon: (i) perintah-perintah bahawa masa terhad oleh ss 126 dan 128 Akta Profesion Undang-Undang 1976 ('APU') untuk memfailkan tindakan ini dilanjutkan memihak kepada plaintif-plaintif; (ii) defendan dikehendaki untuk menyediakan bil kos terperinci berikutan A 59 k 17(2) Kaedah-Kaedah Mahkamah 2012; dan (iii) bil kos tersebut

A ditetapkan atas dasar peguam-anak guaman. Defendan berhujah bahawa plaintif-plaintif dikecualikan daripada mencabar bil tersebut kerana telah luput lebih dari 12 bulan sejak penghantaran bil kepada plaintif-plaintif. Mahkamah Tinggi menolak permohonan plaintif-plaintif dan maka, rayuan ini oleh plaintif-plaintif.

B

Diputuskan, membenarkan rayuan tanpa perintah kepada kos:

(1) Bil masing-masing dihantar ke alamat plaintif-plaintif. Plaintif-plaintif telah mengakui menerima bil. Sebaik sahaja plaintif-plaintif menerima
C bil, ia adalah bukti prima facie penghantaran kepada plaintif-plaintif. Setelah menerima bil tersebut, adalah wajib ke atas plaintif-plaintif, berikutan kepada s 126(1) APU, untuk memfailkan petisyen dalam masa enam bulan dari penghantarannya jika plaintif-plaintif berniat untuk mempertikaikan bil tersebut, yang mana plaintif-plaintif gagal berbuat
D sedemikian (lihat perenggan 20–22).

(2) Jumlah yang digambarkan dalam bil tidak serta merta jelas dan menjadi hutang yang kena dibayar kepada defendan hanya atas tamat tempoh satu tahun selepas penghantaran bil kepada plaintif-plaintif. Tidak
E terdapat peruntukan di bawah APU yang memperuntukkan secara spesifik untuk pelanjutan masa untuk memfailkan permohonan untuk cukai terhadap bil kos, selepas satu tahun dari penghantarannya kepada pihak yang tidak berpuas hati (lihat perenggan 25–26).

F (3) Plaintif-plaintif telah mengupah defendan untuk memperolehi perintah mahkamah yang tidak rumit untuk surat pentadbiran. Defendan menjelaskan butir-butir kerja undang-undang yang dibuat tanpa jumlah wang ditunjukkan terhadap setiap item. Bil hanya menunjukkan jumlah keseluruhan sebanyak RM600,000 mewakili kos kesemua item. Ini
G adalah dengan sendirinya keadaan khas, yang mana adalah alasan untuk mahkamah menjalankan bidang kuasanya yang sedia ada untuk membenarkan pelanjutan masa plaintif-plaintif dan untuk merujuk kepada bil untuk cukai dan penentuan (lihat perenggan 32–33).

H (4) Fi sebanyak RM600,000 adalah terlalu berlebihan dan tidak sepadan dengan kerja undang-undang yang dilakukan. Ini, prima facie, adalah keadaan khas yang mewajarkan Mahkamah Tinggi untuk menjalankan bidang kuasa dengan memberikan perintah untuk cukai. Tidak pernah terdapat apa-apa hujahan yang dibuat oleh defendan dalam afidavit
I mereka untuk mencabar hujahan plaintif-plaintif dalam afidavit sokongan bahawa jumlah sebanyak RM631,141.20 adalah terlalu banyak. Defendan dalam membentangkan permohonan tidak menjelaskan fi yang terlalu tinggi sebanyak RM600,000 (lihat perenggan 34–35).]

Notes

For cases on bill of costs, see 9 *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1982–1995.

Cases referred to

Harry Lee Wee v Haw Par Brothers International Ltd [1980] 2 MLJ 228, CA (refd)

Pembinaan Lian Keong Sdn Bhd v Yip Fook Thai (practising as Messrs Yip & Co) [2005] 5 MLJ 786; [2005] 6 CLJ 34, HC (refd)

Perusahaan Petanda Bintang Sdn Bhd v Asbir, Hira Singh & Co [1995] 2 MLJ 455; [1995] 3 CLJ 234, HC (folld)

Phuah Choon Hwang & Anor v Hassan & Kong Yeam [1987] 1 MLJ 156; [1986] CLJ (Rep) 579 (refd)

Storer & Co v Johnson and Weatherall (1890) 15 App Cas 203, HL (refd)

Legislation referred to

Legal Profession Act 1976 ss 126, 126(1), 128, 128(2)
Rules of Court 2012 O 59 r 17(2)

Appeal from: Originating Summons No 17D-8–02 of 2014 (High Court, Kuala Lumpur)

Yong Woon Yee (Owee & Ho) for the appellants.
Nora Hayati Ismayatim (Nora Hayati & Assoc) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] In the High Court, Tan Tek Sin and Yap Sin @ Yap Yiaw ('the plaintiffs') took out an originating summons dated 7 February 2014 ('the OS') against Tetuan Nora Hayati & Assoc ('the defendant') seeking, among others, the court's discretion to grant an order to compel the defendant to prepare a detailed bill of costs pursuant to a bill issued by the defendant dated 9 September 2009, and for taxation and determination of the same.

[2] The defendant was the plaintiffs' lawyer. The bill in question was in the sum of RM631,141.20 of which RM600,000 for legal fees alone. The plaintiffs disputed the bill on account that it was unduly exorbitant and in every respect disproportionate to the legal work expended.

[3] The High Court dismissed the OS. Hence, the plaintiffs' appeal to this court. It has to be noted that the High Court did not provide grounds of decision in dismissing the plaintiffs' OS.

[4] We heard the plaintiffs' appeal, and at the conclusion of the hearing we

unanimously allowed it. We now give our reasons for so deciding.

[5] For convenience and ease of reference, we will refer to the parties in this judgment in the manner they were referred to in the High Court.

[6] The plaintiffs are two of the beneficiaries of the estate of Law Kuar ('the estate'). The defendant is a firm of advocates and solicitors.

[7] Sometime in July 2003, the plaintiffs engaged the defendant to obtain a court order for the letters of administration in respect of the estate to be granted to Amanah Raya Bhd ('ARB'), and for ARB to be appointed as the administrator *de bonis non* in place of the two trustees of the estate, who had passed away ('the legal work').

[8] The legal work performed by the defendant included, among others, the preparation and filing of an Originating Summons No S7-24–1695 of 2003 dated 10 September 2003 ('the LA application') at the Kuala Lumpur High Court. On 26 January 2006, pursuant to the hearing of the LA application, an order, among others, was granted appointing ARB as the administrator *de bonis non* of the estate.

[9] Upon completion of the legal works, the defendant raised the bill and presented it to ARB for ARB's payment. When ARB refused to pay towards the bill, the defendant filed a claim vide S-22NCVC-57 of 2011 ('the S22 Suit') against ARB for the recovery of the sum stated in the bill. The S22 Suit was resisted by ARB. The defendant's claim against ARB was in the end dismissed by the High Court on 12 March 2012. The High Court held that the defendant had no locus standi to sustain the claim against ARB and that the issue pertaining to the legal fees ought to be strictly settled between the plaintiffs and the defendant herein. That decision was later affirmed by the Court of Appeal.

[10] Based on the findings of the High Court in S22 Suit, on 30 October 2012, the defendant sent by registered post to the plaintiffs a letter enclosing Bill No 12/2006.

[11] The plaintiffs took the position that they did not receive the letter and the bill in question.

[12] As events unfolded, the defendant subsequently initiated a legal action against the plaintiffs via Sessions Court Suit No B52NCVC-100–11 of 2013 ('the Sessions Court Suit') to recover the legal fees as reflected in the bill.

[13] According to the plaintiffs, as soon as they were made aware of the Sessions Court Suit, they, as we have indicated earlier, filed the present OS for the following orders:

(1) that the time limited by ss 126 and 128 of the Legal Profession Act 1976 ('the LPA') for the filing of this OS be extended in favour of the plaintiffs pursuant to the inherent jurisdiction of this court;

(2) that the defendant be compelled to prepare or cause the preparation of a detailed bill of costs premised upon the defendant's 'Bill No 12/2006' dated 9 September 2009, pursuant to O 59 r 17(2) of the Rules of Court 2012, within a period of 30 days from the date of this court order;

(3) that the said bill of costs be referred to an officer of the court to be taxed on a solicitor-client basis;

(4) that the plaintiffs agree to pay to the defendant any such sum or sums so ordered by the court to be payable to the defendant pursuant to the taxation of the said bill of costs;

(5) that pending the outcome of the taxation of the said bill of costs, no proceedings are to be instituted against the plaintiffs in respect of the said bill;

(6) that the costs pursuant to this OS be borne by the defendant; and

(7) such further relief or reliefs as deemed appropriate, relevant and applicable by this court.

[14] In the affidavit in support of the OS, the plaintiffs disputed the bill on account that a sum in excess of RM600,000 was excessively exorbitant and wholly disproportionate to the legal work expended. The plaintiffs maintained their willingness to pay the defendant any sum as directed by the court pursuant to a fair and reasonable taxation exercise conducted in respect of the bill.

[15] On the other hand, the defendant, in response to the OS, offered nothing in the affidavit in opposition to justify the sum as billed, but merely maintained that the plaintiffs were precluded from challenging the bill on account that more than 12 months had lapsed since the delivery of the bill to the plaintiffs.

[16] When the appeal came up before us, learned counsel raised two principal grounds in support of this appeal.

[17] First, it was submitted that the plaintiffs had not received the bill from the defendant on or about 30 October 2012 as so alleged by the defendant. Learned counsel for the plaintiffs referred to the first plaintiff's affidavit filed in

support of the OS wherein it was averred that the plaintiffs did not receive the bill from the defendant within such period as so alleged. The plaintiffs maintained that they were only made aware that the defendant had made efforts to deliver the bill to the plaintiffs from the cause papers filed in the Sessions Court Suit.

[18] For the proper determination of this issue, two provisions of the LPA are relevant. The first is s 126(1) which prescribes, with the necessary emphasis, as follows:

> An order for the taxation of a bill of costs delivered by any advocate and solicitor may be obtained by a petition as a matter of course by the party chargeable therewith, or by any person able to pay the cost either to the party chargeable or to the advocate and solicitor, at any time *within six months from the delivery of the bill*, or, by the advocate and solicitor after the expiration of one calendar month, and within a year from, the delivery.
>
> (Emphasis added.)

[19] The second provision is s 128 which states, with the necessary emphasis, as follows:

> (1) *After the expiration of six months from the delivery of a bill of costs*, or after payment of the bill of costs, no order shall be made for taxation of a solicitor's bill of costs, except upon notice to the advocates and solicitors and under special circumstances to be proved to the satisfaction of the Court.
>
> (2) No such order for taxation shall in any event be made after the expiry of *one year from the delivery of the bill of costs*.
>
> (Emphasis added.)

[20] The important question that arises is, when was the bill delivered to the plaintiffs? Evidently, the letter dated 30 October 2012 together with the Bill No 12/2006 were sent to the plaintiffs' respective addresses and the same were duly acknowledged by the plaintiffs on 1 and 5 November 2012 respectively (see pp 674–679 record of appeal, Vol V, Part C). The 'acknowledgment cards' as exhibited by the defendant, in our view, disclosed that the plaintiffs had in fact acknowledged receipt of the bill.

[21] In our judgment, once the plaintiffs had received the bill, it is prima facie proof of delivery to the plaintiffs on 30 October 2012. Other than a bare denial in the affidavit, the plaintiffs had failed to rebut the proof of delivery.

[22] Now, having received the bill on 1 November 2012, it was incumbent upon the plaintiffs, pursuant to s 126(1) of the LPA, to file a petition within six

months from the delivery if the plaintiffs intended to dispute the bill. This the plaintiffs had failed to do so.

[23] This then brings into sharp focus the plaintiffs' second ground in support of the appeal. In substance, learned counsel for the plaintiffs contended that even though more than one year had lapsed since the delivery of the bill, the court could exercise its discretion in invoking the inherent jurisdiction to grant an order to compel the defendant to prepare a detailed bill of costs for taxation and determination of the same.

[24] In opposing the contention of the plaintiffs, learned counsel for the defendant submitted that by virtue of s 128(2) of the LPA, no order for taxation for the bill can be made. She submitted that s 128(2) contained restriction on making an order for taxation after the expiration of one year from the date of delivery of the bill. It was further submitted that there was no provision in the LPA, for extension of time or enlargement of time in respect of a petition under s 128 of the LPA exceeding one year from the date of delivery of the bill. Hence by the provisions of s 128 of the LPA, learned counsel for the defendant submitted, the sum reflected in the bill had been crystallised and the plaintiffs were precluded from making the OS.

[25] With all respect, we disagree with the contentions of the defendant. The first important point to note is that the sum reflected in the bill did not immediately crystallise and become a debt due to the defendant merely upon the expiry of the one year period after the delivery of the bill on 1 November 2012 to the plaintiffs. This is the general principle of law as can be seen in *Pembinaan Lian Keong Sdn Bhd v Yip Fook Thai (practising as Messrs Yip & Co)* [2005] 5 MLJ 786; [2005] 6 CLJ 34, where the High Court held that there is no deeming provision in the LPA, by virtue of which the court could hold that if the party chargeable fails to petition for an order for taxation within one year from the delivery to him of the bill of costs the amount stated in the bill would ipso facto be converted into a debt due and payable to the advocate and solicitor.

[26] Undeniably s 128 of the LPA prescribes a time limit for an aggrieved party to refer a bill of costs for taxation and in particular provides that such order for taxation shall not in any event be made after the expiry of one year from the delivery of the bill of costs. There is indeed no provision under the LPA that specifically provides for extension or enlargement of time to file an application for taxation of a bill of costs, after one year from its delivery to the aggrieved party.

[27] The question then arises whether court has the power by virtue of its inherent jurisdiction to depart from the provisions of statute, where the

circumstances so require. In this regard the case of *Phuah Choon Hwang & Anor v Hassan & Kong Yeam* [1987] 1 MLJ 156; [1986] CLJ (Rep) 579 is instructive. There, the petitioners, who were residents in Singapore had retained the respondents as their solicitors in a case which involved the distribution of the estate of the deceased. Later, the respondents informed the petitioners' solicitors in Singapore that in lieu of taxation they would like to deduct from the estate money a certain sum for their professional fees. The petitioners' solicitors protested and asked the respondents to have their bills of costs taxed. Three months later the respondents forwarded to the petitioners' solicitors two sets of bills of costs which were later handed to their present solicitors for further action. Subsequently, the present solicitors filed the petition for an order that the two sets of bills of costs be taxed on a solicitor and client basis. The petitioners' solicitors also filed an application by way of summons in chambers for an order that the time limited by s 126 of the LPA for the filing of the petition be extended. After taking into consideration all the circumstances of that case, Mohamed Dzaiddin J (as His Lordship then was) held that the court's inherent jurisdiction should be exercised by ordering taxation of both bills of costs because justice requires that such an order should be made, notwithstanding that the petitioner's solicitors had allowed the 12 months period to elapse without making the application. Mohamed Dzaiddin J referred to the House of Lords decision in *Storer & Co v Johnson and Weatherall* (1890) 15 App Cas 203 to hold that 'as for the inherent jurisdiction of the Court, the authorities show that it is exercised independent of the statute'. In *Storer & Co v Johnson and Weatherall*, Lord Halsbury said:

> ... I believe that Your Lordships are all of opinion that in a proceeding under the Solicitors Act we cannot do what is asked to be done by the appellants. But it was of course open to the Court to pronounce a judgment which should do justice between the parties when once the case was brought before them. This was not a case in which the summons absolutely bound the court as to the remedy which they should administer; and I think it is quite clear that the Solicitors Act did not deprive the Court of the jurisdiction which they always possessed to do justice in the premises when dealing with one of their officers, and that they might therefore order that the costs should be taxed, although not in terms of the Solicitors Act, and they might have selected one particular portion of the bill of costs to be taxed. The moment it was taken out of the region of the Solicitors Act and brought within the general jurisdiction of the Court, then the Court could exercise its own jurisdiction in the way it might think fit; and I am of opinion that the Court rightly exercised its jurisdiction so far as it was advised of what were the real facts.

[28] In *Perusahaan Petanda Bintang Sdn Bhd v Asbir, Hira Singh & Co* [1995] 2 MLJ 455; [1995] 3 CLJ 234, the High Court held that by virtue of their role as watchdog over the conduct of solicitors (being officers of the court), the courts were not precluded under the LPA from invoking its inherent jurisdiction, in appropriate cases even in petitions made outside the stipulated period, where the facts pleaded disclose a serious misconduct of gross

overcharging or fraud on services rendered by an advocate and solicitor. A

[29] It is therefore clear on principle and authorities that that even though more than one year had lapsed since the delivery of the bill to the plaintiffs, the court could exercise its discretion in invoking the inherent jurisdiction to grant an order to compel the defendant to prepare a detailed bill of costs. B

[30] Applying the principles from the authorities that we have adverted to earlier, the most important question which we must now ask is whether there were special circumstances in the present case which would require the exercise of the court's inherent jurisdiction to grant an order to compel the defendant to prepare a detailed bill of costs even if more than one year had lapsed since the delivery of the bill to the plaintiffs. C

[31] In this regard, we have read with care the judgment of Mohamed Dzaiddin J in *Phuah Choon Hwang & Ors v Hassan & Kong Yeam*. In our view, it was implicit within the judgment of that case that the contention of the petitioners that the bills involved were 'oppressively' excessive had lent credence to the existence of special circumstances that warrant the intervention of the court under its inherent jurisdiction. In the Singapore Court of Appeal case of *Harry Lee Wee v Haw Par Brothers International Ltd* [1980] 2 MLJ 228, it was held that where a solicitor's bill did not have specific sums shown against each item as detailed, itemised or narrated within the bill, but rather a final lump sum figure shown to represent the costs of all the items, would in itself, constitutes special circumstances for the exercise of the court's discretion to order for the bill to be taxed. D E F

[32] Coming back to the present case, it is important to note that in the main the plaintiffs had engaged the defendant to obtain a relatively uncomplicated court order for the letters of administration in respect of the estate. It would in general involve the preparation and filing of an originating summons, a corresponding affidavit in support and affidavits of consent of all the beneficiaries. G

[33] Even more to the point, the defendant had set-out the particulars of the legal work done without any sum being shown against each item. The bill only just showed a lump sum of RM600,000 representing the costs of all the items (see pp 670–673 record of appeal, Vol V Part C). This would in itself be a special circumstance, which would be a ground for the court to exercise its inherent jurisdiction to allow the plaintiffs' extension of time and to refer the bill for taxation and determination. H I

[34] More than that, it is imperative that we should highlight a crucial fact. There was never any averment made by the defendant in their affidavit in

opposition to challenge the plaintiffs' contention in the affidavit in support 'that the combined professional fee and alleged expenditure of RM631,141.20 imposed through the defendant's Bill No 12/2006 is astronomical to say the least and certainly does not commensurate with the work done' (see para 17.1 of the plaintiffs' affidavit in support, p 61 of the record of appeal, Vol 1 Parts A and B). The defendant in opposing the OS did not explain or clarify the exorbitant fee of RM600,000. This, prima facie, would be a special circumstance that warrants the High Court to exercise its inherent jurisdiction by granting an order for taxation.

[35] Taking into account the entire spectrum of the legal work done by the defendant, the fee of RM600,000 would arguably, as submitted by learned counsel for the plaintiffs, be grossly excessive and did not commensurate with the legal work done. In our view, the justice of the case required an order for taxation to be made.

[36] Based on our aforesaid findings, we had allowed the plaintiffs' appeal with no order as to costs and we set aside the order of the High Court. Accordingly, judgment was entered against the defendant in terms of prayers 1, 2, 3, 4 and 5 of the OS. We further ordered that the Sessions Court Suit proceedings be stayed pending the taxation of the bill of costs before the registrar of the High Court.

Appeal allowed with no order as to costs.

Reported by Afiq Mohamad Noor